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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RAMON RIVERA, JR., Defendant and Appellant.	E055877 (Super.Ct.No. RIF10001414) OPINION

APPEAL from the Superior Court of Riverside County. Sharon J. Waters, Judge. Affirmed.

Kenneth H. Nordin, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant Ramon Rivera, Jr., appeals after he pleaded guilty to a charge of failing to complete his re-registration as a sex offender within five days of his birthday. Soon after the guilty plea, he sought to withdraw his plea, and to have new

counsel appointed. The trial court denied defendant's motions for new counsel and to withdraw his plea. Defendant filed a timely notice of appeal. We affirm.

FACTS AND PROCEDURAL HISTORY

As of early 2010, defendant was a person who was subject to Penal Code section 290, with a lifetime requirement that he register as a sex offender, within five working days of his birthday each year. In mid-February 2010, a police officer for the city of defendant's residence noted that no new or updated registration was on file on or near defendant's birth date; the last time defendant had registered was approximately five months earlier, in September 2009. At the time defendant had registered in September 2009, he had signed a receipt, which advised him of his next registration date near the end of January of 2010.

By a criminal complaint in March 2010, defendant was charged with one count of failing to timely register within five days of his birth date. A preliminary hearing was conducted on May 5, 2011, and defendant was held to answer on the charge.

On October 18, 2011, defendant withdrew his not guilty plea, and agreed to plead guilty to the charge. The plea form indicated that defendant would be placed on formal probation for 36 months, including a requirement that he serve 90 days in custody, with credit for one day already served. The court also imposed a court security fee of $20, a court conviction assessment fee of $30, a booking fee of $414.45, a restitution fine of $200, and a probation revocation fine of $200, which was stayed. Defendant's change-of-plea form recited, among other things, that all the promises made to him were written on the form or stated in open court, no one had threatened him or pressured him to plead

guilty, and he had had adequate time to discuss the plea and its consequences with his attorney. Defendant also agreed that he "did the things that are stated in the charges that I am admitting," as a factual basis for the plea. Defendant personally initialed each of these recitations.

The transcript of the plea hearing bears out the plea form recitations. Defendant specifically told the court that he had read and gone over the form with his attorney, and that he had personally placed his initials beside each indicated statement and signed the form. Defendant affirmed that he understood the constitutional rights he was giving up and any consequences of his plea. Defendant specifically denied that any other promises had been made to him, and denied that anyone had pressured him to plead guilty. Defendant had no questions to ask of the court before the court received his plea.

In November 2011, defendant applied to change his required custody time of 89 days from weekend service to the sheriff's labor program, to accommodate some medical issues defendant was suffering. The court granted this request, noting that defendant still owed 89 custody days.

On January 25, 2012, defendant appeared in court to make an oral motion for substitution of counsel, pursuant to *People v. Marsden* (1970) 2 Cal.3d 118. Defendant also moved to withdraw his plea; he told the court that his attorney and the probation officer had coerced him into pleading guilty. The court agreed to hold a confidential hearing on defendant's *Marsden* motion on February 6, 2012, at which time it would also consider defendant's request to withdraw his plea.

On the date that defendant appeared for the *Marsden* hearing, the court assigned the matter to another department to hear the motion proceedings. At the confidential *Marsden* hearing, defendant stated that he had been coerced into pleading guilty. Defendant explained that his attorney told him that, if he did not take the plea and if he went to trial and lost, then he would receive three years in prison. Defendant complained to his attorney that he could not do three years in prison, because he would lose his social security benefits, his income, his home and his vehicle. For that reason, he agreed to accept the court's proffered plea. Defendant also complained that some of the terms of the agreement changed after he agreed to plead guilty: "So not taking it to trial, I take a plead agreement [*sic*] which was not set correctly to me and ankle bracelets and stuff like that. When I got to the station, it was totally different thing, and it's not what they had said they were going to do."

Defense counsel explained that, at the time of the plea, the matter had been assigned out for trial. Because the charged offense was an "irreducible felony," defendant would be required to serve a statutory minimum of 90 days in custody, even under the best case scenario, if he were convicted and then granted probation. The court therefore offered defendant the opportunity for a plea, granting probation, with the prospect of some accommodation in serving the 90-day custody requirement, such as weekend service or service under house arrest. Defendant had "exercised his option to take the deal from the Court." It was not a plea that was negotiated with the prosecution.

The court found that defendant had entered into his plea knowingly and voluntarily, and that defendant had received as a result of the bargain the minimum

period of incarceration that he could possibly receive upon a guilty finding or plea. Defendant's motion to withdraw his plea, which was the articulated reason for requesting substitution of counsel under *Marsden*, was "based upon reasons that are extraneous to the original proceedings." The court found no conflict between defendant and his appointed public defender, and thus no reason to appoint new counsel. The court therefore denied defendant's *Marsden* motion, and returned the matter to the law and motion court.

Upon return of the case to the original motion department, the court heard defendant's request for an extension of time to begin serving his custody time with the sheriff's labor program. Defendant had not yet begun serving his custody time because of alleged medical conditions, which prevented him from performing the labor as required in the sheriff's labor program. The court granted defendant a 30-day extension of time to begin his service with the sheriff's labor program, but directed defendant to bring in actual medical records to substantiate his condition, and whether he was medically qualified to participate in the sheriff's labor program. The court emphasized that, "at some point, the option to do the work program is an option[,] not a right. So if you are unable to do it at some point, you may end up in custody serving it. . . ." Defendant indicated that he understood.

Defense counsel informed the court that defendant still wished to pursue a motion to withdraw his plea, but that she herself saw no grounds to do so and, thus, would not be filing such a motion before the court. The court stated that it "would not order you to file something you believe to be frivolous." The court stated, "That's why the law says we

are to conduct a *Marsden* [hearing], so the judge inquires. Apparently, the judge inquired that you did properly represent him in the case." The court thus found there was no basis to file a motion to withdraw the guilty plea, and ordered defendant to appear in 30 days.

When defendant appeared at the continued date, he renewed his request to withdraw his plea. The court noted that that motion had already been heard and decided; the court denied defendant's renewed request. Defendant claimed he still had ongoing medical issues, which prevented him from participating in the sheriff's labor program, and he had failed to bring his medical records to court. The court ordered defendant to report to a road camp facility to begin his custody service on weekends, starting March 23, 2012.

Immediately following the hearing, on March 7, 2012, defendant filed a notice of appeal. The notice of appeal stated that defendant challenged the validity of the plea, and further recited that defendant had been "under threat and duress at the time the plea was entered, hindering the exercise of free judgment." Defendant requested and was granted a certificate of probable cause, to pursue a claim of ineffective assistance of counsel. Defendant urged that his trial counsel was ineffective for failing to assist defendant in filing a motion to withdraw his plea.

ANALYSIS

I. Potential Issues Identified in Appointed Counsel's Brief

Upon defendant's appeal, this court appointed counsel to represent him. Appointed counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436, and *Anders v. California* (1967) 386 U.S. 738 [87 S.Ct. 1396, 18 L.Ed.2d

493], setting forth a statement of the case, and suggesting the following potential arguable issues:

1. Whether the trial court erred in denying defendant's *Marsden* motion.

2. Whether the court erred in denying defendant's motion to withdraw his plea.

3. Whether the matter should be remanded to have the trial court make a finding whether defendant had the ability to pay the booking fee imposed.

4. Whether the matter should be remanded, because there is no evidence that defendant was told that he had the right to dispute a finding of his ability to pay the probation hearing costs, and he did not waive that right.

Counsel further averred that defendant had been informed of his right to file a personal supplemental brief. Defendant has, at least nominally, filed such a brief.[1]

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[1] Defendant's supplemental brief appears to have been prepared by ":John-Brian: Swain.," who purports to be an "International-Law-Attorney," and who lists "ABA Bar No. 02014186" as his licensure. Swain appends a declaration to the brief, in which he avers under penalty of perjury that: "I am an attorney licensed to practice under the laws of the State of California, and I am of counsel in for [*sic*] Fidelitas-Legal-Architects-Group, attorney for appellant, in this action and appeal."

No substitution of attorney is of record on appeal; therefore, despite his representations to the contrary, Swain is not the attorney for defendant. We treat the brief as having been filed by defendant in propria persona.

We note that this does not appear to be Swain's first attempt to inject himself improperly into the proceedings. Although the person speaking in the trial court proceedings (quoted below) is not identified, it appears that Swain attempted to appear for or with defendant at the hearing of February 6, 2012, after the matter was returned from the *Marsden* hearing to the regular law and motion court:

"UNIDENTIFIED SPEAKER: Excuse me, your Honor?

"THE COURT: No, sir. You take a seat.

"UNIDENTIFIED SPEAKER: I have a duty of—

[footnote continued on next page]

II. Potential Issues Identified in Defendant's Supplemental Brief

Defendant's supplemental brief essentially piggy-backs onto the *Wende*/*Anders* brief filed by appointed counsel. The supplemental brief, like appointed counsel's brief, includes a statement of the case, and a truncated statement of facts. Like appointed counsel's brief, the supplemental brief recites that *Anders* and *Wende* are the applicable cases, in essence conceding the lack of meritorious substantive issues, but identifying potential arguable issues for the reviewing court to explore in its examination of the record. Defendant's supplemental brief repeats the same four issues suggested in appellate counsel's brief (possible *Marsden* error, possible error in denying the motion to withdraw the plea, remand to determine defendant's ability to pay the booking fee, remand to inquire whether defendant wished to dispute or waive any issue concerning his ability to pay probation hearing costs), and identifies three additional potential issues:

[footnote continued from previous page]

"THE COURT: Are you licensed to practice law in the State of California? . . . Sir?

"UNIDENTIFIED SPEAKER: I'm an international bar attorney under the International Bar Association.

"THE COURT: Sir, I'm going to cite you. If you don't take a seat, I'm going to cite you. If you don't have a license to practice law in the State of California, and you're standing up to purport to represent him, if you continue, I'm going to cite you for contempt. I'm giving you a warning right now.

"UNIDENTIFIED SPEAKER: I understand.

"THE COURT: Take a seat. You may not address the Court. You're not licensed to practice law in the State of California. You may not address the Court."

The court shows some familiarity with the unidentified speaker (presumably, Swain) and short-circuited his attempt to intervene. Swain, likewise, has no standing to appear or otherwise intervene in these appellate proceedings. Nevertheless, we consider the brief as defendant's personal supplemental brief.

"5. Is a guilty plea constitutionally valid when coerced under threat and duress, or does it render contract obligations voidable?

"6. Does a malicious and intentional battery that injures a party causing an involuntary breach of contract transfer liability for the breach and create a vicarious liability suit against the employer by a police officer who commits the tort while acting within the scope of employment?

"7. Is the District Attorney liable under the Americans with Disabilities Act for lawsuit abuse for prosecution of a false claim alleging failure to register as a sex offender on March 25, 2010 if the registrant has proof of registration on February 18, 2010?"

In support of the latter claim, the briefing asks this court to take judicial notice of Exhibit 1 and Exhibit 2, which he argues were presented to the trial court, but which the court failed to address. A document labeled Exhibit 1, which appears to consist of two identical photocopies of a registration receipt for defendant's Penal Code section 290 registration, is attached to the supplemental brief. No other document purporting to be Exhibit 2 is attached.

Within the supplemental brief, defendant makes no argument as to the merits of any of the suggested potential arguable issues. Rather, he simply requests the court to conduct a review of the record (supplemented by judicial notice of the attached exhibit).

III. Upon Independent Review of the Record, No Arguable Issues Appear

We have conducted an independent review of the record, and find no arguable issues on appeal.

As to the *Marsden* motion and the request to withdraw his plea, these issues are intertwined. Defendant sought new counsel solely because he wanted to withdraw his guilty plea, and his appointed public defender saw no grounds for making such a withdrawal motion. Defendant was able to articulate his reasoning to the *Marsden* court (as well as to the law and motion court): defendant claimed that he was "coerced under duress in applying for my plea here . . . ." He argued that his attorney and the probation officer coerced him into taking the plea.

At the *Marsden* hearing, defendant explained that his attorney told him, "that if I didn't take this plea, I would do three years, and that is where I said, 'I can't do three years, I will lose my social security, my income, I would lose my home and the vehicle that I have purchased and been paying for the last several years.' So that was a ground for being under duress in that situation when she told me other deals that I could do this and do that, and it was totally changed around."

Defendant had articulated some of the same concerns at the time he agreed to plead guilty. Defendant told the trial court that he wanted to plead to a misdemeanor. Defendant's trial attorney had explained, however, that the charge filed was not a wobbler, it was a felony, and could not be reduced to a misdemeanor unless the prosecutor was willing to allege a different offense:

"THE COURT: And your attorney has advised that there is no conceivable way you can get a misdemeanor?

"THE DEFENDANT: Yes, I guess.

"THE COURT: That is the case, absent the People being willing to change the charge. This is not what in some parlance is called a 'wobbler' that can be charged and sentenced as a felony or misdemeanor. This can only be charged and sentenced as a felony.

"So if you are convicted, you'll get, at least, 90 days. It may be more. It's my practice to always send it out for a probation report. I don't know what they will recommend in that situation.

"That's why I'm talking to you again, because I want to make sure that you understand that what you want, a misdemeanor, is not possible. You understand?

"THE DEFENDANT: Kind of. I don't really understand on that part."

The court allowed additional time for defendant to discuss the matter with his attorney. After defendant conferred with his attorney, the court inquired again:

"THE COURT: Does it change your mind about the indicated that was previously offered to you? [¶] . . . [¶]

"THE COURT: Judge Fields had offered 90 days.

"THE DEFENDANT: With a felony.

"THE COURT: It is going to be a felony if you're convicted.

"THE DEFENDANT: Yes.

"THE COURT: You understand that?

"THE DEFENDANT: Yes.

"THE COURT: I understood in a disposition that would involve probation and 90 days.

"THE DEFENDANT: You mean 90 days in jail?

"THE COURT: Yes.

"THE DEFENDANT: I'll lose everything I have, so I can't even do that. So, no.

"THE COURT: All right. Again, I keep asking these questions, Mr. Rivera, because I'm not sure you're understanding. If you are convicted, the Court cannot give you less than 90 days probation. . . . [T]he [L]egislature mandates a 90-day jail term as a minimum. . . . [T]here is no getting around it in that situation."

Defendant asked to speak with his attorney again.

The court went on to explain that it was not intending to influence defendant one way or the other with respect to his decision whether to proceed to trial or to plead guilty. The court reiterated, however, that if defendant proceeded to trial and were convicted, "there are certain absolutes that you have to accept. It is going to be a felony. [Neither] [t]he jury, nor the Court, can change that. And if you are convicted, as an absolute minimum, the best sentence you could get after trial is probation and 90 days in county jail."

The proceedings were paused to permit defendant to discuss his concerns further with his attorney. After that discussion, defendant completed the change-of-plea form and accepted the court's indicated sentence plea bargain:

"THE COURT: Mr. Rivera, I take that to mean that the Court's indicated sentence of three-years' probation with the mandatory minimum 90 days in county jail is acceptable to you, correct?

"THE DEFENDANT: Yes."

Defendant proceeded to accept the court's sentence of three years of formal probation, with "90 days' jail time as required." Defendant specifically denied that any other representations or promises had been made to him, and he specifically denied that anyone had put pressure on him to plead. He stated he had no other questions for the court.

An examination of the record shows that defendant raised the identical ground of "coercion" before the court in the first instance when his plea was taken—that if he were required to serve time in jail, he would "lose everything"—and that the court refused to take his plea until defendant had fully discussed those concerns with his attorney, and agreed freely to accept a sentence of probation with a minimum of 90 days of custody as a term of that probation. Defendant had fully explored and been satisfied as to the same ground of "coercion" before his plea was ever taken.

Consequently, the *Marsden* court properly found that there was no basis for a motion to withdraw the plea on the ground of "coercion." With the elimination of a proper ground to withdraw his plea, defendant's *Marsden* request—to have a new attorney appointed to make such a motion to withdraw the plea—also was without merit.

As to the possible remand to inquire into defendant's ability to pay the booking fee, defendant never objected below to the imposition of the booking fee. That issue was therefore forfeited. (*People v. McCullough* (2011) 193 Cal.App.4th 864, 867.)

There is also no need to remand to inquire whether defendant was informed of his right to dispute his ability to pay any "probation hearing costs." Defendant was ordered to pay $200 (the minimum amount) as a probation revocation restitution fine, but that

fine was stayed. The record indicates that the court initially ticked a box that defendant pay the "cost of pre-sentence report," but that provision was marked out and no amount filled in, presumably because defendant was sentenced without a probation report. No otherwise identifiable "probation hearing costs" were imposed.

As to the additional issues raised in defendant's supplemental brief, none is meritorious, and they may border on the frivolous. The purported issue of threat and duress has been addressed above, and rejected as lacking in merit. Defendant was fully aware of the consequences of his plea, including the alleged "coercive" circumstances, when he made his plea.

The ground of "malicious and intentional battery" as an issue for appeal has apparent reference to defendant's representations to the court that he was unable to fulfill his 90-day custody obligation through the sheriff's labor program, because of medical issues, including an accusation that "the sheriff tore my rotator cuff." Defendant had elaborated on this accusation earlier that day in the *Marsden* hearing: Defendant was requesting a modification of his 90-day custody requirement to substitute "community service, and I can't perform that duty because of injuries that were inflicted on me from the police department." The court noted that defendant had already been granted one modification, from weekend service to the sheriff's labor program, "which is supposed to be able to give you light duty. You haven't been able to?" Defendant explained that, "They didn't have light duty, and they also stated that my time couldn't be around people. . . . [¶] . . . [¶] So the sheriff would not take me in. . . . [T]hen they gave me another modification for community service. But in doing so, I was injured by a police

officer when I went to go register at the lobby at the station." Defendant said that he had initially been involved in a motorcycle accident in August 2011; when the court told defendant to register at the police department within five days after his guilty plea in October 2011, defendant "went to register in the lobby, that is when the police officer reinjured my arm. He tore my rotator cuff . . . ." This was apparently proffered as a reason or excuse why defendant had failed to start serving his 90 days of custody, through any of the various programs offered to him.

Defendant's complaints focused on the specific manner in which he would serve the 90 days of custody to which he had agreed under the plea. He had been initially offered the chance to serve his time on weekends. However, he did not report for weekend service (scheduled to begin in November 2011), and then moved to modify the manner of service. He requested a modification to participate in the sheriff's labor program instead. That modification had been granted in November 2011. He was ordered to report in December of 2011. As of January 2012, defendant still had not begun his service; his complaints of injury apparently referred to his medical disqualification from the sheriff's labor program. It was at that point that defendant moved to withdraw his plea, and the court set a *Marsden* hearing for the following month, February 2012. In February 2012, the *Marsden* hearing was held and the motion denied; the law and motion court also subsequently denied defendant's renewed oral motion to withdraw his plea. The court did, however, grant defendant an extension to begin his service with the sheriff's labor program, based on defendant's oral representations that his injuries presently prevented his participation. The court directed

defendant to appear in one month, March 2012, and to provide medical records documenting his specific medical condition, and how long defendant's expected recovery would take. The court emphasized that it would stay the beginning of defendant's required service through the sheriff's labor program until defendant brought in his medical documentation in March. However, the terms of the plea bargain specifically required a minimum of 90 days of custody service. "But, at some point, the option to do the work program is an option[,] not a right. So if you are unable to do it at some point, you may end up in custody serving it." Eventually, defendant would have to serve the 90 days of custody, by whatever method. Up to February 2012, nearly four months after sentencing, defendant had yet to begin serving the balance (89 days) of his 90-day custody term. The court further stayed the custody requirement until the March hearing. The court reiterated, however, that, "[a]t some point, if you can't get it [the labor program] done, then you will be in custody."

As the *Marsden* hearing judge pointed out, however, all this was extraneous to the issue whether defendant had knowingly and voluntarily entered his plea, whether there was any ground to withdraw the plea, or whether substitute counsel should be appointed to file a motion to withdraw defendant's plea. Defendant was not testifying under oath as to his medical condition, he did not present formally admissible documentary evidence to support his medical claims and, in any case, the issue of injury by a police officer (that is, whether defendant's injuries rendered him unable to participate in a custody program, such as weekend service or the sheriff's labor program) was relevant only to the *manner* in which defendant would serve his required 90 days of custody; it was not relevant to

any issue surrounding the validity of defendant's plea (i.e., his agreement to probation with 90 days' custody as a required term), or to the merits of any appeal. Likewise, any suggestion that a police officer might have civil liability to defendant for causing injuries, alleged to have occurred while the officer was acting within the course and scope of employment, was wholly irrelevant to the validity of defendant's plea in the criminal case, or to any issues on appeal from the judgment in the criminal case.

The final issue, purporting to attack the factual basis underlying the judgment, is likewise without merit. Defendant has framed the issue in terms of possible liability of the district attorney under the Americans with Disabilities Act, but this is a red herring or mixture of irrelevancies. The charged offense concerns a straightforward factual question: did defendant timely register within five days of his birthday in 2010? Defendant attempts to assert that the charge is false, because it "alleg[ed] failure to register as a sex offender on March 25, 2010," whereas defendant had "proof of registration on February 18, 2010 . . . ." The felony complaint was filed on March 25, 2010, alleging that, as of February 18, 2010, defendant had violated the provision requiring him to register annually within five days of his birthday. Even if we were to take judicial notice of the unauthenticated registration forms attached to defendant's supplemental appellate brief (his alleged "proof" of registration on February 18, 2010), or to otherwise accept defendant's representation that he did register on February 18, 2010, his registration on that date still failed to show that he registered in a timely fashion, within five days of his birthday in 2010. His birthday was not within five days of February 18, 2010. Defendant has failed to demonstrate that the charge filed was false.

DISPOSITION

None of the issues suggested by appellate defense counsel or by defendant in his supplemental brief has any merit. Upon full examination of the record, we have discovered no arguable issues on appeal. The judgment is affirmed.

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McKINSTER
Acting P. J.

We concur:

RICHLI
J.

CODRINGTON
J.